

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FELIX GARCIA,

Petitioner,

-against-

09 Civ. 6593 (CM)(JCF)

AUBURN CORRECTIONAL FACILITY,

Respondent.

X

DECISION AND ORDER DENYING PETITIONER'S MOTION TO HOLD THE
PETITION IN ABEYANCE WHILE HE EXHAUSTS HIS STATE REMEDIES

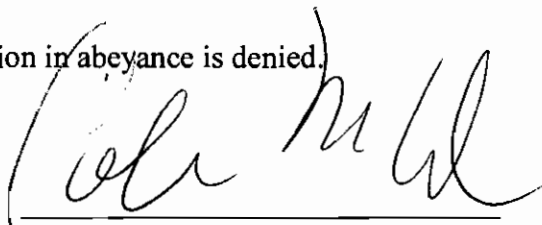
McMahon, J.:

The Court has received a letter from Mr. Garcia asking the Court to hold his habeas petition in abeyance while he exhausts his state court remedies. (Garcia letter dated June 18, 2009, received in Chambers July 30, 2009). Mr. Garcia says that he has a CPL § 440.10 motion pending in state court challenging his conviction on "ineffective assistance of counsel" and "extreme emotional disturbance" grounds.

A Court may, in its discretion, stay a habeas case while a petitioner pursues state remedies on unexhausted claims. See Rhines v. Weber, 544 U.S. 269 (2005). The stay-and-abeyance procedure is available when the Court is confronted by a mixed petition— exhausted and unexhausted claims contained within the **pending** petition. See Clancy v. Phillips, 04 CV 4343KMK, 2005 WL 1560485, at *6 (S.D.N.Y. July 1, 2005) (emphasis added).

Here, Garcia's petition does not seek relief on either "ineffective assistance of counsel" or "extreme emotional disturbance" grounds. Whether or not Garcia has exhausted his state court remedies with respect to those claims has no bearing on the Court's resolution of the pending petition. Accordingly, there is no basis for the Court to invoke the stay-and-abeyance procedure.

Petitioner's motion to hold his petition in abeyance is denied.



U.S.D.J.

Copies mailed/faxed/handed to counsel on 8/13/09

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United States Magistrate Judge James C. Francis

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